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NO. 84-1589

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS BEFORE THE DISCIPLINARY BOARD OF THE WASHINGTON STATE BAR ASSOCIATION

AGAINST

RICHARD M. BARNEY, JR., AN ATTORNEY AT LAW, PETITIONER.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

RESPONSE TO PETITION

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ADDITIONAL RULES INVOLVED

Rules for Lawyer Discipline (Washington).

RULE 7.3 DISCRETIONARY REVIEW

(a) Decisions Subject to Discretionary Review. Decisions of the Disciplinary Board entered pursuant to rule 6.7(e) which do not provide for suspension or disbarment are subject to review by the Supreme Court only through discretionary review. Discretionary review will be accepted only:

(1) If a decision of the Board is in conflict with a decision of the Supreme Court; or

(2) If a significant question of law is involved; or

(3) If there is no substantial evidence in the record to support a material finding of fact upon which the decision of the Board is based; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RULE 9.1 RESTRICTIONS AGAINST PETITIONING

(a) When Petition May Be Filed. No petition for reinstatement shall be filed within a period of 3 years after disbarment or within a period of 2 years after an adverse decision of the Supreme Court upon a former petition, or within a period of 1 year after an adverse recommendation of the Board of Governors on a former petition when that recommendation is not submitted to the Supreme Court. If prior to disbarment the lawyer was suspended from the practice of law pursuant to the provisions of Title 3, or any comparable rule, the

period of such suspension shall be credited toward the 3 years referred to above.

COUNTERSTATEMENT OF THE CASE

In 1983, petitioner Richard M. Barney, Jr., an active Washington State attorney, hired Robert L. Butler to work in his law office. Mr. Butler's duties included reviewing accounting records on one client's case and doing legal research on others. Mr. Butler was at the time both a disbarred attorney and a convicted felon, on criminal probation for the same theft of client funds which had led to his disbarment (Petition, App. 6-7).

When he hired Mr. Butler, petitioner Barney was aware of the provisions of Rule 1.1(h) of the Washington Rules for Lawyer Discipline, and its restrictions on associating with a disbarred or suspended

attorney in one's law practice (Petition, pp. 4-5). He was also aware of Washington Formal Ethics Opinion 171 (Petition 6-7). See Finding 14 (App. 10). That opinion had been adopted by the Board of Governors of the Washington State Bar Association and published with the specific approval of the Washington Supreme Court. Opinion 171 states in part:

> This clear prohibition against attorneys practicing law while compensating a disbarred attorney means that an attorney in good standing who hires a disbarred attorney in any capacity could be subject to discipline... .

(Emphasis added.)

Mr. Barney was charged in disciplinary proceedings brought pursuant to the Washington Rules for Lawyer Discipline (RLD) with violation of RLD 1.1(h) for his employment of Mr. Butler. A hearing was held, and the hearing officer recommended dismissal. On review, the Disciplinary Board unanimously reversed, finding that

RLD 1.1(h) prohibits employment of a disbarred lawyer in a law office, and therefore finding Mr. Barney had acted contrary to the rule. However, it was the decision of the Board to impose no discipline on him (Petition, App. D).

Rule 7.3(a) of the Washington Rules for Lawyer Discipline, set forth in full supra at p. 1, provides for discretionary review by the Washington Supreme Court of Disciplinary Board decisions not involving suspension or disbarment. Acceptance of review is limited to cases involving significant questions of law; issues of substantial public interest; conflicts with Washington Supreme Court decisions; or lack of substantial evidence to support a material finding of fact.

Mr. Barney's counsel filed a petition for discretionary review, and presented his constitutional and other claims to the Washington Supreme Court, which

summarily denied review (App. A).

ARGUMENT

This Case Presents No Constitutional Issue of Substance.

In the State of Washington, a lawyer may not employ a disbarred attorney to work in a law office, where the disbarred lawyer will have access to client files, client confidences, and possibly client funds. Counsel provides no support for the proposition that this limitation presents an important question of federal law, or in fact any federal question whatever.

The right of freedom of asssociation has rarely impinged on the power of the states to regulate businesses (or professions). This Court has recognized that "the Constitution undoubtedly imposes constraints on the State's power to control

the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees." Roberts v. United States Jaycees, 468 U.S. ____, 104 S.Ct. 3244, 3251, 82 L.Ed.2d 462 (1984). Concurring in the same case, Justice O'Connor said it quite simply:

> [T]he State is free to impose any rational regulation on the commercial transaction itself. The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State.

104 U.S. at p. 3258.

Specifically with regard to the legal profession, see Hishon v. King & Spalding, ____U.S.____, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), which dismissed in one paragraph a law firm's contention that its constitutional freedom of association was infringed by its being compelled to give a woman non-discriminatory consideration for

partnership.

Petitioner cites no case which suggests that after disbarring an attorney as unfit to hold a license to practice law, the State of Washington lacks authority to keep the disbarred lawyer from simply moving down the street and working on clients' cases in someone else's law office. Certainly the interest of the State is substantial:

> In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions.

Ohralik v. Ohio State Bar Association, 436 U.S. 447, 461, 98 S.Ct. 1912, 1920, 56 L.Ed.2d 444 (1978).

The Washington restriction is reasonable. A lawyer who has been disbarred has been found to be unfit to practice law, and a danger to the interests of clients and the profession. The

restriction is also limited. In the State of Washington, a lawyer who is disbarred may apply for reinstatement to the practice of law after only three years. See Rule 9.1(a) of the Washington Rules for Lawyer Discipline, set out in full supra at p. 2. If the lawyer is found to be rehabilitated and reinstated, the restrictions of RLD 1.1(h) are of no further effect. If found unworthy of reinstatement, the restrictions continue to deny the disbarred lawyer access to a law office, as this State believes is appropriate.

The other issue raised in the petition--the claimed right to voir dire the Disciplinary Board which considers an attorney's case to uncover possible but unknown bias--is not a federal question at all.

CONCLUSION

A state prohibition on employment

of a disbarred attorney in an active attorney's law office is both reasonable and constitutional, and presents no federal question of substance. Certiorari should be denied.

Respectfully submitted,

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